Crossing borders between international refugee law and international human rights law in the European context: can human rights enhance protection against persecution based on sexual orientation (and beyond)?

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Crossing Borders between International Refugee Law and International Human Rights Law in the European context: Can Human Rights Enhance Protection against Persecution based on Sexual Orientation?

Carmelo Danisi*

1. Introduction

In the last decades, international refugee law (IRL) and international human rights law (IHRL) have increasingly taken into account sexual minorities' needs. Despite not being one of the grounds of persecution under the 1951 Geneva Convention on the Status of Refugees (Refugees Convention),[1] sexual orientation[2] has been identified as a relevant factor for the recognition of refugee status, at least, since 1993.[3] In the intervening period, people persecuted for a sexual minority identity have been able to find protection under IRL due to the evolving interpretation of the Refugees Convention's five grounds, in particular that of 'membership of a particular social group' (PSG).[4] In turn, IHRL has evolved to a point where sexual minorities are more fully included within the scope of rights and freedoms set forth in universal and regional human rights treaties, in particular

* University of Sussex (UK) and University of Bologna (Italy). This contribution has been produced within the context of the project SOGICA – Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge. This project has received funding from the European Research Council under the European Union's Horizon 2020 research and innovation programme (Grant agreement no. 677693). The author wishes to thank the anonymous referees for their insightful comments, as well as prof. N. Ferreira and dr. M. Dustin for their valuable suggestions. All errors remain mine.

[1] Convention relating to the Status of Refugees, opened to signature in Geneva on 28 July 1951 and entered into force on 22 April 1954 (see also the Protocol of 1967 extending the Convention's scope of application).

[2] For the purpose of this article, we refer to sexual orientation as defined by the *Yogyakarta Principles*, at https://yogyakartaprinciples.org.

[3] Eg *Canada (Attorney General) v Ward*, [1993] 2 S.C.R. 689 (Canada, Supreme Court, 30 June 1993); *Geovanni Hernandez-Montiel v Immigration and Naturalization Service*, [2000] 225 F.3d 1084 (US, 9th Cir., 24 August 2000); *Appellants S395/2002 and S396/2002 v Minister for Immigration and Multicultural Affairs*, [2003] HCA 71 (Australia, High Court, 9 December 2003).

[4] This contribution is based on the UNHCR's definition of PSG: see UNHCR, *Guidelines on International Protection: Membership of a particular social group*, 2002, 3.

via the prohibition of discrimination. This evolution gave rise to a sort of 'humanisation' of lesbian, gay, bisexual and transgender (LGBT) people,[5] resulting in recognition of the need to specifically address their socially disadvantageous position.

Yet, strange as it may seem, this simultaneous development has not always led to a mutual or fruitful intersection between IRL and IHRL when people fleeing homophobia are involved.[6] This is particularly evident, as this article shows, when this intersection is tested at the interpretation level. In fact, despite what the rules on the interpretation of treaties require,[7] IHRL has played a limited role in defining key terms of the Refugees Convention so far. In light of the potentially beneficial effect for all people claiming asylum, this article explores from two different angles what role IHRL may play in enhancing the protection provided by IRL to people fleeing homophobia. It argues that IHRL may, firstly, complement IRL in facilitating their access to asylum determination procedures in those States that are bound by the Refugee Convention and human rights treaties. Secondly, IHRL may expand the notion of persecution used in IRL when sexual orientation is the ground of one's well-founded fear of persecution, at least more comprehensively than it currently does in practice. In this attempt, this contribution goes beyond previous analyses because it relies not only on research on the European human rights and asylum legal framework[8] and on asylum based on sexual orientation and gender

[5] Paul Johnson, *Homosexuality and the European Convention on Human Rights* (Routledge 2014).

[6] Although this article takes the example of persecution based on sexual orientation, many of the issues raised would be equally true for other sexual minorities, such as people fleeing transphobia given the similar experiences they have to face in terms of intense social and legal discrimination. See Laurie Berg and Jenni Millbank 'Developing a Jurisprudence of Transgender Particular Social Group' [2013] UTS: Law Research Paper No. 1.

[7] Convention on the Law of the Treaties, opened to signature in Vienna on 1969 and entered into force in 1980, Article 31, para 1 and 3, c).

[8] These will be referenced where appropriate. For a specific study on the EU framework on SOGI asylum, see Nuno Ferreira 'Reforming the Common European Asylum System: Enough Rainbow for Queer Asylum Seekers?' [2018] (2) GenIUS 25-42.

identity (SOGI) grounds,[9] but also on qualitative data collected in the context of the ERC-funded SOGICA project in Italy.[10]

The paper is structured as follows. Section 2 briefly examines the evolution of IRL and IHRL in protecting sexual minorities, pointing out the cross-fertilisation between these different branches of international law while highlighting the potential scope for further intersection. Section 3 builds a case for a complementary role of IHLR in protecting against persecution based on sexual orientation, showing how the obligation to implement the Refugees Convention may, in turn, raise obligations under IHRL. In doing so, a model of jurisdiction based on impact is explored. Section 4 investigates to what extent a more fruitful intersection between these two areas of international law is possible in terms of interpretation. By taking into account the Vienna Convention on the Law of the Treaties (VCLT), it focuses on the definition of persecution as a remarkable example of the still uncrossed border between IRL and IHRL. The qualitative data underpinning this study relates to people seeking protection in Europe, therefore both sections drawn on recent interpretations of international and regional human rights treaties and on developments within the European Union (EU). The EU has in fact given birth to a unique asylum system that is a remarkable example of intersection between IRL and IHRL, whereby the

[9] Among others, Jenni Millbank 'The Role of Rights in Asylum Claims based on Sexual Orientation' [2004] HRLR193-228; James Hathaway, James Pobjoy 'Queer Cases Make Bad Law' [2012] ILP; Jenni Millbank 'The Right of Lesbians and Gay Men to Live Freely, Openly and on Equal Terms is Not Bad Law: A Reply to Hathaway and Pobjoy' [2012] NYUJILP 497-515; Marco Balboni *La protezione internazionale in ragione del genere, dell'orientamento sessuale e dell'identità di genere* (Giappichelli 2012); Thomas Spijkerboer (ed), *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge 2013); France Houle, Karine Mac Allister 'Quand le droit international des droits de l'Homme et le droit canadien des réfugiés LGBTQ+ convergent' [2017] CJWL 317-342.

[10] The SOGICA project includes fieldwork research, with interviews, focus groups and observations in court, in UK, Germany and Italy. The fieldwork research has been approved by the Social Sciences & Arts Cross-Schools Research Ethics Committee (C-REC) ethical review process at the University of Sussex (Approval no. ER/NH285/1). The evidence used in this article refers to the outcomes of 40 interviews carried out with a variety of actors (people claiming asylum, decision-makers, professionals and volunteers working with and/or supporting SOGI claimants) in Italy, in 2017 and 2018. See <www.sogica.org> for more info (accessed 7 August 2019).

Refugees Convention as the cornerstone of Common European Asylum System (CEAS)[11] is combined with the need to respect the EU's (international and internal) human rights obligations. Some final remarks are made in Section 5.

2. Proof of intersections between IRL and IHRL in asylum claims based on sexual orientation

In both IHRL and IRL, a clear trend has progressively emerged for addressing sexual minorities' protection claims that was absent at the time of their genesis. All relevant instruments, including respectively the Refugees Convention and human rights treaties, have been given an evolving reading to reflect the social development of today's international community, both in terms of forms of persecution and of prohibited discrimination in the enjoyment of the full catalogue of human rights and freedoms.[12]

If we look first at IRL, the persecution of people fleeing homophobia gained international attention due to the process of 'gendering' the Refugees Convention.[13] The peak of this process was the adoption by the UNHCR of specific SOGI Guidelines,[14] which significantly draw on IHRL. In particular, the Guidelines made clear that SOGI claims are not based only on "exogenous" harms but, more often than not, originate from what can be called an 'intimate modification' of oneself imposed by the society in which the individual lives. This is not equal to (only) a modification of behaviour in, or the impact of this modification on, people fleeing homophobia.[15] Because sexual orientation is an

[11] Eg Case C-604/12 *N*. [2014] ECLI:EU:C:2014:302, para 27.
[12] Carmelo Danisi *Tutela dei diritti umani, non discriminazione e orientamento sessuale* (Editoriale Scientifica 2015).
[13] UNHCR, *Guidelines on International Protection: Gender-Related Persecution*, 2002 (UNHCR Gender Guidelines).
[14] UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2012 (UNHCR SOGI Guidelines). In light of the scope of these Guidelines, this section might also refer to gender identity where appropriate.
[15] Hathaway, Pobjoy, 'Queer Cases Make Bad Law' (n 9) 333.

innate or an immutable characteristic protected as such under IHRL, harm may also arise from the inability to express one's identity without fear of persecution. Therefore, people cannot be required to renounce or conceal their sexual orientation in recognition of the impact this has in every dimension of life.[16]

In this way, the UNHCR SOGI Guidelines crossed the border of classical harm in the refugee context to include types of relational-driven harms, ie those originating from the interaction between an inherent personal characteristic and an external environment preventing its full expression. At the same time, they stressed the variety of experiences of people claiming asylum on sexual orientation grounds, which may be influenced by cultural, economic, family, political, religious and social factors. Although this interaction may vary across countries and people in light of the different factors at play, the need for international protection may nonetheless arise. Additionally, the nature of this interaction does not prevent an asylum claim arising even when the inherent characteristic is not possessed. In fact, in line with the general interpretation of the notion of refugee, it is sufficient that one's belonging to a sexual minority – eg being gay – is assumed by the surrounding society ("attribution"), thus generating the risk of related persecution.[17] As with the gender dimension, this may be the case when the person has simply refused to adhere to 'socially or culturally defined roles or expectations of behaviour attributed to his or her sex',[18] thus engendering the suspicion of being non-heterosexual. This occurs even more frequently, according to cases reported by decision-makers in Italy when men have sex with other men for economic reasons or needs.[19] For the purposes of application of the Refugees Convention, it is immaterial whether these

[16] The CJEU shared also this view in Joined cases C 199/12 to C 201/12, *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel (X and Others)* [2013] ECLI:EU:C:2013:720, para 70. This article does not investigate the issue of 'discretion', but see Moira Dustin 'Many Rivers to Cross: The Recognition of LGBTQI Asylum in the UK' [2018] IJRL, 104-127.
[17] UNHCR Gender Guidelines (n 13) [41].
[18] ibid [16].
[19] Eg, interview with first-instance judge (Italy, 9 April 2018).

men are gay, what matters is whether they have a well-founded fear of persecution because are perceived as such by the surrounding society.

Following previous attempts by the UNHCR[20] based on a reading of IRL in light of IHRL, the Guidelines also clarify that persecution has a case-specific dimension consisting of "serious" human rights violations or "the cumulative effects" of a number of these violations.[21] Most importantly, they stress that this seriousness refers to the harm perpetrated upon, or feared by, the claimant and if this harm had or might have a degrading and humiliating effect, irrespective of being "physically, psychologically or socially" produced. This definition seems to support a powerful conclusion: when sexual orientation is involved, the threshold of severity can also be reached when the treatment of the person at stake amounts to a denial of this intimate characteristic, including self-denial or feelings of shame leading to the inability to be open about one's sexual orientation.[22] Yet, as we will show below, seven years after the adoption of said Guidelines these human rights violations are still not univocally identified as persecution.

If we move to IHRL, thanks to an increasing international consensus,[23] a constant trend has emerged calling for an inclusive interpretation of the full catalogue of human rights, alone *and* in combination with non-discrimination provisions where these provisions complement other substantive rights and freedoms (eg Art. 2 ICCPR; Art. 14 ECHR). Without analysing here the peculiarities of this process, it is noticeable that such an evolution emerges in the activities of all international human rights treaty-based bodies, as well as in universal *fora* such as the UN General Assembly or the UN Human Rights

[20] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention* (Reissued), Geneva, 2011.
[21] ibid [51]-[53]; UNHCR SOGI Guidelines (n 14) [20]-[25].
[22] ibid [26]-[33].
[23] Eg Human Rights Council, *Human Rights, Sexual Orientation and Gender Identity*, 2 October 2014, A/HRC/RES/27/32.

Council.[24] A transversal trend also informs all regional organisations – the Organisation for American States (OAS),[25] the African Union (AU),[26] the Council of Europe (CoE)[27] – leading, at least to a certain extent, regional human rights bodies to include the SOGI dimension in the interpretation of regional charters and conventions.

Taken comprehensively, these developments have reinforced the understanding of sexual orientation as a core human rights issue. Furthermore, international and regional human rights bodies have progressively affirmed the idea that contracting States may be asked to undertake positive actions to address sexual minorities' specific needs. Similarly, blanket restrictions on the enjoyment of human rights based solely on SOGI have been found to amount to serious interferences, if not denials, of one's most intimate aspect.[28] Perhaps even more interestingly, the same human rights bodies have also drawn attention to the nexus between the lack of enjoyment of human rights and the consequence for the individual expression of sexual orientation in terms of one's ability to freely make life choices. As a result, the long-standing distinction between prohibited treatment and permissible restrictions under IHRL is increasingly put to the test. For instance, it becomes extremely difficult nowadays to justify restrictions on the enjoyment of the right to respect for family life, being this right also a way to express one's sexual orientation deserving protection under IHRL[29] (and, as argued below, also under IRL). It is no surprise that these developments have also had positive implications for the treatment of claimants who request asylum in reasons of sexual orientation at arrival. If we focus on Europe, the most powerful instance of this (new) approach to people fleeing homophobia

[24] Dominic McGoldrick 'The Development and Status of Sexual Orientation Discrimination under International Human Rights Law' [2016] HRLR, 613-668.
[25] Eg *Human Rights, Sexual Orientation, and Gender Identity and Expression*, 5 June 2014, Resolution AG/RES. 2863 (XLIV-O/14).
[26] Eg African Commission on Human and Peoples' Rights, Resolution 275, 12 May 2014.
[27] Eg Committee of Ministers of the CoE, *Measures to combat discrimination based on sexual orientation or gender identity*, 31 March 2010, Recommendation CM/Rec(2010)5.
[28] Eg *Smith and Grady v UK* App nos. 33985/96 and 33986/96 (ECtHR, 27 September 1999).
[29] Eg *Oliari and Others v Italy* App nos. 18766/11 and 36030/11 (ECtHR, 21 July 2015).

emerged in *O.M. v Hungary*.[30] Here the ECtHR clearly identified sexual minorities with an asylum background as a 'vulnerable' group, thus calling upon CoE States to provide individualised assessments and elaborate specific solutions to their particular needs once these claimants reach their borders.

This overall evolution is extremely relevant for arguing that IHRL may still play an additional role in the protection of people fleeing homophobia in intersection with IRL, if we focus the attention on the territorial and normative borders that these claimants encounter in their search of a 'safe place', as the next sections show.

3. Beyond (territorial) borders: facilitating access to asylum through human rights law

Despite its primary aim being to protect people fleeing persecution on the five grounds provided by the Refugees Convention, it does not require that contracting States facilitate access to their national asylum determination systems. The same requirement, if aimed at preventing human rights violations, is still being debated under IHLR. To the contrary, at least in Europe, we instead see increased efforts to prevent such access. As Violeta Moreno-Lax has effectively demonstrated in relation to the EU's and its member States' migration policies, nowadays a complex mix of border controls follow migrants, including asylum claimants, in their attempt to access Europe. Strikingly enough, 'the system as currently devised appears to imply that, while pre-entry controls can operate extraterritoriality, protection obligations arise only if potential beneficiaries present themselves at the (physical) borders of the EU'.[31] In practice, the main consequence is a high risk of exposing asylum claimants to dangerous journeys to reach European borders.

[30] *O.M. v Hungary* App no 9912/15 (ECtHR, 5 July 2016). On the concept of vulnerability in the ECHR, Alexandra Timmer, Lourdes Peroni 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' [2013] ICON, 1056.

[31] Violeta Moreno-Lax, *Accessing Asylum in Europe* (OUP 2018), 247.

This risk emerges powerfully in the personal accounts of SOGI claimants from Sub-Saharan African countries gathered through the SOGICA fieldwork. Their journeys to Europe have always exposed them to serious human rights violations, including forced stays,[32], forced labour, sexual exploitation and robberies,[33] and rapes.[34] In the worst scenario, a claimant from Cameroon reported 'I came with my boyfriend but he didn't make it, he died in the sea',[35] but the lack of legal recognition of their relationship denies the surviving partner the ability to report his boyfriend's death appropriately and see it recorded as such. In recounting their passage to Libya, a claimant from Nigeria even stated 'It's even better that you are recognised as a gay in Nigeria than to be recognised as a gay in Libya'.[36] These violations seem to combine the well-documented general hostility towards migrants with hostility to sexual minorities. As a claimant from Cameroon explained, 'I didn't face a problem as a LGBT because I didn't identify myself as a LGBT. I was just passing. So nobody, like, knew who I was […] But, based on other stories I hear […] especially in the Muslim countries [LGBT claimants] are being tortured […] they can kill you'.[37] Of course, avoiding human rights violations by deciding to hide one's sexual orientation is not always a possible or practical 'choice'.[38]

Despite the risk of exposing asylum claimants to these additional abuses and suffering, the existence of an obligation to grant safe access to asylum claimants by issuing humanitarian visas was dismissed within the EU by the CJEU.[39] Interestingly, although EU asylum law aims to create a sort of 'Geneva +' trying to combine the respect of IRL

[32] Interview with male claimant from Nigeria (Italy, 3 January 2018).
[33] Interview with male claimant from Nigeria (Italy, 30 June 2018).
[34] Interview with female claimant from Nigeria (Italy, 20 April 2018).
[35] Interview with male claimant from Cameroon (Italy, 17 October 2017).
[36] Interview with male claimant from Nigeria (Italy, 16 December 2017).
[37] Interview with male claimant from Cameroon (Italy, 17 October 2017).
[38] For instance, in terms of appearance, some gay people may find difficult to behave as being straight. See also the reasoning followed by the ECtHR in the first cases related to the criminalisation of same-sex sexual activity in defendant States: *Norris v UK* App no 10581/83 (ECtHR, 26 October 1988); *Modinos v Cipros* App no. 15070/89 (ECtHR, 22 April 1993).
[39] Case C-638/16 PPU *X and X* [2017] ECLI:EU:C:2017:173, para 51.

with IHRL, issuing humanitarian visas cannot be derived from the current state of EU law but remains nonetheless a possibility left to EU member States' discretion. As the CJEU notes this discretion should be implemented in compliance with their international obligations, ie those derived from IRL and IHRL, beyond EU law.[40] In order to verify whether such compliance may lead to an obligation to facilitate access to national asylum determination procedures for people fleeing homophobia, we now focus our attention on the effects that the denial of humanitarian visas has on these people.

3.1 Establishing jurisdiction and 'impact'

The absence of an obligation to facilitate access to asylum under IRL is essentially connected with the scope of application of the Refugees Convention. As other international treaties, that Convention binds States within their territorial borders. Even its core protection beyond refugee status, ie the duty of *non-refoulement* under Article 33, which may be implied in the process of deciding the issuance a humanitarian visa, makes no exception. More precisely, although Article 33 of the Refugees Convention can be applied to all refugees/people claiming asylum against any measures leading – directly or indirectly – to *refoulement*, this provision does not make clear whether or not it has extraterritorial effect. This state of uncertainty is due also to the general scope of the Refugees Convention. In light of the notion of refugee, this Convention requires that asylum claimants, being unable or unwilling to request protection in the State of origin, should apply "before" the authorities of the receiving State (thus implying in most cases a physical presence in this State or, at least, at its borders). Following the same rule, the *non-refoulement* principle under the Refugees Convention seems to require the presence of the people in need of international protection in the receiving State (or at its borders) in order to apply.[41]

[40] ibid [44]-[45] and [51].
[41] See Moreno-Lax, *Accessing Asylum* (n 31).

When human rights bodied have been called to interpret IRL, they have provided a broader reading of this provision. For instance, the Inter-American Commission on Human Rights found that Article 33 of the Refugees Convention cannot have the above geographical limitation.[42] In fact, despite being primarily territorial, the application of this Convention depends on the receiving State's position with respect to the asylum claimant. It follows that this person can also be "under the control" of one of the contracting States – eg a foreign territory over which it exercises its power by invitation or force,[43] or when they are placed under that State's authority, eg before diplomatic agents or on ships flying its flag[44] – in order to enjoy protection against *non-refoulement*.[45] Yet, even if this is true, the protection against *non-refoulement* under IRL would nonetheless be limited to cases of persecution for the reasons expressed in Article 33 of the Refugees Convention, ie those relevant for being identified as a refugee (race, religion, nationality, membership of a particular social group or political opinion).

Considering the difficulty experienced by people fleeing homophobia in proving a well-founded fear of persecution (see section 4 below), IHRL goes beyond these limitations by potentially ensuring a wider and autonomous protection. In fact, the principle of *non-refoulement* in human rights treaties has been included or developed to prevent torture and, as in the case of the ECHR, inhuman and degrading treatment on any basis.[46] Consequently, it can also cover a more comprehensive range of situations that may not

[42] *The Haitian Centre for Human Rights et al. v United States* Case 10.675 (Inter-American Commission, 13 March 1997), para 157.

[43] Eg HRC, *Concluding Observations: Israel*, 18 August 1998, para 10; ICJ, *Legal Consequences of the Construction of a Wall in OPT*, 9 July 2004, para 109.

[44] For a summary of relevant decisions by human rights bodies, see Lisa Heschl, *Protecting the Rights of Refugees Beyond European Borders* (Intersentia 2018), 63-80.

[45] See also the ECtHR's case law, which has being pushing jurisdiction beyond European territorial borders to ensure that certain ECHR rights are effectively enjoyed by people fleeing persecution when they are placed under the control of a State party: *Sharifi and Others v Italy and Greece* App no 16643/09 (ECtHR, 21 October 2014); *Hirsi and Others v Italy* App no 27765/09 (ECtHR, GC, 23 February 2012).

[46] See Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (OUP 2014).

prima facie amount to persecution *per se* or that are experienced during the journeys to access asylum. On this basis, IHRL may require relevant States do not expose asylum claimants, who intend to submit an asylum application and are under their jurisdiction, to forms of prohibited ill-treatment, including those motivated by one's sexual orientation. Therefore, it can be argued that, under IHRL, States that exercise authority over asylum claimants by deciding whether or not to admit them to their territory, so as to have their asylum requests duly evaluated, are required to consider the impact that their decision has in terms of exposure to human rights violations. This argument seems to be supported in particular by the recent interpretation of the International Covenant on Civil and Political Rights (ICCPR) by the Human Rights Committee (HRC). In its General comment no. 36 on Article 6 ICCPR (the right to life), the HRC makes two fundamental statements for our purposes. Firstly, it states that the right to life 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity', focussing the attention on the 'foreseeable and preventable life-terminating harm or injury'.[47] Secondly, by looking at the observance of contracting States' obligations beyond territorial borders, it points out that the contracting State 'must also take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but *having a direct and reasonably foreseeable impact* on the right to life of individuals outside their territory, are consistent'[48] with Article 6 ICCPR. Considering the right to life as a non-derogable right

[47] HRC, *General Comment no. 36*, 2018, para 5-7.

[48] ibid [22] (emphasis added). Indeed, at para 63, the HRC clearly finds that all persons subject to its jurisdiction means '*all persons over whose enjoyment of the right to life [a State party] exercises power or effective control.* This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner' (emphasis added).

as well as the prohibition of torture and the principle of *non-refoulement*, the position adopted by the HRC may have a wider application.

Following this reasoning, any decision adopted in places subject to contracting States' jurisdiction which prevents people fleeing homophobia from accessing asylum should embed an evaluation of its 'direct and reasonably foreseeable impact' on the enjoyment of these rights outside their territory. If we take the example of a decision on the issuance of a humanitarian visa requested by a person who wishes to flee homophobia, the specific situation of this group of claimants seems to play a central role in this evaluation. Firstly, the general risks to which this group is exposed is publicly known. The levels of homophobia or transphobia of the countries of origin, as well as of those that need to be crossed to access asylum, are regularly monitored and documented, eg by relying on the existence of laws criminalising a specific sexual orientation. Considering the personal accounts reported above, in addition to the abuses occurred or might occur in their countries if they do not flee, SOGI claimants often need to cross countries, like North-African States, which cannot be assumed to be safe in light of their human rights records in this field.[49] Secondly, and perhaps mostly important, in the case of refusal of a safe passage to the destination country of asylum, this group of claimants is forced to travel with people having the same cultural and social background as their persecutors in their countries of origin. In light of the developments that have occurred within IRL and IHRL (see section 2), this means they need to continue hiding their identity to avoid additional abuse and violence, which amounts, at least, to degrading treatment. Consequently, in the case of people fleeing homophobia, there are substantial grounds for believing that the decision to deny a humanitarian visa may expose them to violations of the prohibition of torture and/or inhuman or degrading treatment and, in the worst-case scenario, of the right to life. The impact of such decisions seems indeed reasonably 'foreseeable' and 'direct',

[49] SOGICA interviews (n 10).

calling States bound by IHRL to prevent these violations, if not also ensuring an effective implementation of IRL-related obligations.

3.2 Identifying obligations

This position appears to be supported by the last developments of the ECtHR's case law, both from a general perspective, in relation to the application of the *non-refoulement* principle, as well as from a more specific point of view, when people fleeing homophobia are involved.

In relation to the principle of *non-refoulement*, in *M.A. and Others v Lithuania*[50] the ECtHR found that Article 3 ECHR cannot be limited to preventing *refoulement* in terms of "transfers/removals" from a contracting State to another country.[51] In fact, Article 3 may also cover a decision of "non-admission" at the contracting State's borders if that decision, taken without a previous examination of the individual situation of the applicants, prevents people wishing to claim asylum from presenting their case before a relevant authority. The ECtHR seems therefore open to embracing a new role for the prohibition of torture and ill-treatment (as well as the right to life). In deciding whether refusing admission to Lithuania to a family of seven Russian nationals wishing to claim asylum was a violation of the ECHR, the Court found that the case clearly fell within the defendant State's jurisdiction because the decision of non-admission was attributable to Lithuanian authorities. Moreover, substantially in light of the 'foreseeable' and 'direct' impact of a negative decision, the ECtHR stressed the particular ethnic and political background of the applicants, taken jointly with their intention to request asylum,[52] to hold that it was Lithuania's responsibility to accept their entry. As a corollary guarantee,

[50] *M.A. and Others v Lithuania* App no 59793/17 (ECtHR, 12 December 2018).
[51] Most of the ECtHR's case law has been focused so far on the responsibility of the ECHR States for removing or pushing back people claiming asylum: eg *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, GC, 21 January 2011); *Hirsi and Others v Italy* (n 45).
[52] To be manifested in whatever form, even orally: *M.A. and Others v Lithuania* [109].

in light of the serious risks to which applicants could be reasonably exposed outside Lithuania's territory, its authorities were also required under Article 13 ECHR to ensure them the possibility of appeal before a domestic court with an automatic suspensive effect of the decisions refusing them entry into its territory.[53]

If the specific situation of the asylum claimants was an essential element in the reading of Article 3 ECHR in *M.A.*, when national authorities deal with requests to access asylum by people fleeing homophobia cannot certainly ignore their particular condition. Following the recognition of their 'vulnerability' in *O.M. v Hungary*,[54] the ECtHR found that the defendant State should have paid particular attention to the specific needs of the applicant once he had identified himself as a claimant fleeing homophobia. In practice, this could have been ensured only by carrying out an individual assessment of his case to establish the impact of an inappropriate detention at border on the enjoyment of his human rights under the ECHR. Although that particular case related to deprivation of liberty at borders, protected under Article 5 ECHR, the ECtHR set a principle that has wider application. When people fleeing homophobia fall under the jurisdiction of one or more contracting State(s), positive obligations may arise to prevent – as the ECtHR put it – the reproduction of 'the plight that forced' them to flee in the first place.[55] It may be argued that, in addition to measures aimed to return, expel or push back, these positive obligations apply in relation to any attempt to access asylum refugee determination procedures in Europe, at border or even from their country of origin. In fact, the 'impact' of a decision denying entry to a contracting State may expose people fleeing homophobia to the reproduction of the 'plight' to which the ECtHR referred to.

In sum, once jurisdiction has been established and in light of their 'identified' vulnerability, IHRL may complement IRL in creating specific obligations to facilitate

[53] ibid [119].
[54] *O.M. v Hungary* (n 30) [53].
[55] ibid.

access to asylum in order to prevent the additional abuses and life-threatening violence which people fleeing homophobia may be exposed to when they express their intention to submit an asylum claim before the receiving State's authorities. These may include diplomatic agents but, more generally, all those authorities whose decisions on entry may have a foreseeable and direct impact on the enjoyment of their human rights, at least non-derogable ones. Consequently, for example taking into account the ECHR, issuing humanitarian visas as a potential duty under Articles 2 and 3 ECHR cannot be excluded, which might foster in turn a similar development within EU.

Yet, to be sure, even if a duty to protect people belonging to sexual minorities wishing to claim asylum exists under IHRL, it may not be easy for claimants to secure this protection. The enjoyment of such protection requires the expression of the reason for seeking asylum, which may be an insurmountable barrier for those who fear additional persecution in case of refusal. Others may be unaware of the possibility of securing international protection for such reasons. As one SOGICA interviewee put it, 'I do not need to tell my story to anyone',[56] in relation to strangers. Yet where people fleeing homophobia are able to promptly manifest the reasons for asking asylum, this is no guarantee that they will be recognised as refugees under IRL. They then need to convince national asylum decision makers that they fit the refugee definition and, in particular, that their fear of persecution is well-founded. This specific difficulty for people fleeing homophobia seems to relate to the role attributed to IHRL in the interpretation of IRL, which prevents a more fruitful intersection between these areas of international law as the next section explores.

4. Beyond (normative) borders: interpreting persecution through a human rights lens

[56] Interview with male claimant from Gambia (Italy, 20 April 2018).

The analysis of the UNHCR SOGI Guidelines shows that the identification of (suffered or feared) persecution is, unquestionably, the area where IRL has benefited the most from developments occurred in IHRL.[57] Yet, neither the Refugees Convention nor these same SOGI Guidelines define the notion of persecution.[58] As explored above, the SOGI Guidelines provide only guidance for decision-makers by recalling the seriousness of the harm to identify persecution and stressing the importance of the effect of the (suffered or feared) treatment on the asylum claimant. In doing so, the SOGI Guidelines insist on discrimination suffered in every dimension of the lives of this specific group of claimants.[59] Consequently, the Guidelines avoid identifying which human rights violations amount to persecution. To do so would have risked establishing a fixed – clear but disputable – distinction between 'human rights violations leading to persecution' and 'other human rights violations', which do not amount to persecution. Examples of the first category of violations are nonetheless provided and include criminalisation of homosexuality and/or same-sex sexual activities and the concealment of one's SOGI.[60]
Not surprisingly, such a distinction between human rights violations does not emerge either from claimants' own experiences. For instance, in an attempt to explain his fear of persecution in Cameroon, a claimant stressed that '[s]exual orientation in my country is […] like an abomination […] people should not even talk about it. […] And you are an outcast in the society because first you lose your family, then you lose all the friends you have, and then everywhere you go in the society you are being haunted by the people. So, at times so many people don't even get the chance to experience their life or to try to, like, discover who they really are because of the society'.[61] That is why for 'a typical

[57] See James Hathaway, *The Law of Refugee Status* (CUP 1991), where a first definition of persecution was provided with reference to human rights: persecution was qualified as a 'sustained or systemic violation of basic human rights demonstrative of a failure of state protection', 104.
[58] But see the UNHCR Handbook (n 20), which is not binding.
[59] UNHCR SOGI Guidelines (n 14) [21]-[25].
[60] ibid [26]-[33].
[61] Interview with male claimant from Cameroon (Italy, 17 October 2017).

African […] these are things that you don't tell people. This is something you keep to yourself and you ask a question to yourself and you try to answer yourself because telling another person… I cannot'.[62] Even adopting what was thought as the "safest behaviour" to avoid being rejected by family and society, people may be nonetheless forced to escape. As another claimant put it, 'They don't like erm… bisexual or this sexual, how to call it, this gay and lesbian issue. But since I was doing it, it is just that they never caught me off and I was never expecting it could happen but unfortunately it has happened'.[63] The randomness of events was stressed by a Nigerian claimant: 'if they find out you are a lesbian, they will put you in prison […], they started blackmailing me to bring money […]. *Without saying it,* […] without maybe catching you doing it, maybe that is what they believe. […] everybody will hate you. Everybody will discriminate you, you know, look as if you are alone'.[64] In this respect, social gender-related expectations clearly play a role: 'it got to a point where my mother [wanted] to go and pick a woman from nowhere and to say 'come we want to tie you to my son […] we need a grandchild'. […] I have not been accepted, I still feel somehow caged'.[65]

These experiences support the view that, when asylum claimants belonging to sexual minorities are at stake, feared persecution becomes a fundamental part of their life, well before "visible" human rights violations occur. This fits with the idea of "intimate modification" of oneself imposed by the society, as explored in section 2, which the SOGI Guidelines seem to adopt to regulate the relation between IHRL and IRL.

However, due to the lack of a definition of persecution in the Refugees Convention, decision-makers have supported a more restrictive reading of IRL and, in turn, of the SOGI Guidelines. In fact, if we look at their current practice, decision-makers tend to focus on "visible" and specific abuses in human rights terms in order to recognise refugee

[62] ibid.
[63] Interview with female claimant from Gambia (Italy, 6 March 2018).
[64] Interview with female claimant from Nigeria (Italy, 20 April 2018) (emphasis added).
[65] Interview with male claimant from Nigeria (Italy, 30 June 2018).

status. Interestingly, in absence of these abuses, the decision may either consist of a denial of international protection or, as a proof of the inconsistency of their approach to IRL in light of IHRL, of alternative forms of protection (eg subsidiary protection or humanitarian protection). As the following sub-sections show, this approach seems indeed to be connected with the idea decision-makers have about the real role to be played by IHRL in the interpretation of IRL.

4.1 Avoiding confusion: how IHRL contributes to the definition of persecution in IRL

Taking into account the international law of the treaties, in the absence of a specific agreed definition of persecution, contracting States of the Refugees Convention are required to read and apply it using the criteria of interpretation codified in Article 31 VCLT. Persecution shall therefore be interpreted in good faith and in accordance with its ordinary meaning, in light of the Convention's object and purpose and of the context, together with any relevant rules of international law applicable in the relations between the parties. These rules certainly include IHRL, especially universal and regional treaties that, despite their variety and scope, protect a wide catalogue of rights or freedoms. As explored above, according to the evolving reading of these treaties by the related human rights bodies, all these rights and freedoms are crucial for the legal and social equal recognition of sexual minorities. Consequently, every protected human right and freedom may be potentially relevant for defining persecution in IRL. If read together with the procedural requirements imposed under IHRL for ensuring an individual examination of the case of each claimant (see section 3), identifying persecution in SOGI claims seems to require a flexible approach based on the effect that the alleged human rights violations have on each individual.

In the European context, the EU's attempt in this respect is illustrative. EU law has tried to adopt such an approach by emphasizing the interaction between IRL and IHRL in the

identification of a common, EU-wide, notion of persecution. In fact, going beyond the Refugees Convention, the EU Qualification Directive provides the first comprehensive definition of this term: 'to qualify as persecution, an act must be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights', or 'be an accumulation of various measures provided that the effect is similar to the latter violation'.[66] As Storey has already observed,[67] this provision may be seen as the best available 'working definition' of persecution to implement the Refugees Convention in light of its text, aim and context, including IHRL. Even the non-exhaustive list of acts of persecution confirms this view. These are not based on specific rights, but stress the discriminatory effect produced on people's lives. To name a few, these can be physical or mental violence, legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner, and acts of a gender-specific nature (Art. 9.2 of the Qualification Directive).

Nevertheless, when applied to claims based on sexual orientation, doubts have arisen in the identification of which acts are 'serious enough' to qualify as persecution. Probably supported by the reference to 'rights from which derogation cannot be made' included in the same provision for identifying an 'example' of basic human rights, decision-makers seem to have increasingly set an artificial border within the IHRL's catalogue to regulate its intersection with IRL. Some recent decisions, issued both at supranational and domestic level, may help to illustrate this point.

Called upon to interpret the EU Qualification Directive's provision in relation to sexual orientation claims, the CJEU gave proof of the difficulty in adapting this working definition of persecution to people fleeing homophobia based on IHRL. On the one hand,

[66] See Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 (Qualification Directive), art 9, a) and b).

[67] Hugo Storey 'What Constitutes Persecution? Towards a Working Definition' [2014] IJRL, 282.

X and Others clearly shows how human rights-based considerations may operate in this context. The CJEU accepted that sexual orientation is a fundamental aspect of human personality and, as such, should not be concealed.[68] Consequently, as human rights holders, people who fear persecution for belonging to sexual minorities cannot be asked to keep behaving discreetly because such a request would qualify as a serious human rights violation and a *de facto* (additional) form of persecution. On the other hand, the CJEU set aside IHRL by considering the existence of legislation criminalising same-sex acts in the claimants' home countries 'not serious enough' to identify persecution.[69] In other words, despite the general acknowledgement of the endogenous harm to which people fleeing homophobia are exposed in such countries, the CJEU paid no attention to the effect of criminalisation on their life in terms of human rights enjoyment. In fact, only when this effect becomes 'visible' through a death sentence or a formal punishment in prison, does criminalisation reach a sufficient level of seriousness to qualify as a form of persecution for asylum purposes. In IHRL terms, this seems to support the (disputable) view that criminalisation would only qualify as persecution to the extent it produces violations of basic human rights, such as the right to life or the prohibition of torture, ie when it is concretely applied and entails sanctions of a certain severity.

This finding by the CJEU may be unsurprising if read in light of the ECtHR's case law on these basic rights. Although the ECHR does not enshrine a right to asylum, the ECtHR has been called to evaluate violations of the ECHR alleged by people fleeing homophobia who risked being sent back to their country of origin following the rejection of their asylum application.[70] Yet, since only treatment falling within the scope of Articles 2 or 3

[68] As the CJEU put it in *X and Others* (n 16) [70], 'requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it'.

[69] ibid [53]-[54]: 'not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach that level of seriousness'.

[70] For a full list, see Nuno Ferreira, 'Tables of European SOGI Asylum Jurisprudence' (University of Sussex, 2019) <www.sogica.org> accessed 7 August 2019. To this day, most applications have been

ECHR may raise an obligation to prevent asylum claimants being returned to their home country or to a third State, the ECtHR has been unable to protect people fleeing homophobia under the *non-refoulement* principle to this day. In fact, by relying on the national authorities' 'better position' to evaluate these cases, the ECtHR has never found that the risks to which applicants could have been exposed were "severe enough" to amount to inhuman or degrading treatment and/or torture (or life-threatening acts). The epitome of this approach was reached in *M.E. v Sweden*,[71] where the ECtHR went to far as to accept the possibility of sending a self-identified homosexual person back to his home country because 'he could restrict' his sexual orientation to the private dimension of his life.[72] It is no coincidence that in *X and Others*, following this ECtHR approach, the CJEU seemed to exclude such serious risks by limiting the human rights 'connected' to sexual orientation to certain non-derogable rights enshrined in the EU Charter.[73] Consequently, if a situation is not identified as falling within non-derogable human rights, ie when people fleeing homophobia have tried to enjoy 'other' human rights such as the right to respect for private and family life or the prohibition of discrimination in their countries, it may fall short of being considered in terms of persecution.

An example of this reasoning comes from an asylum case that was adjudicated at national level, namely before a first instance Tribunal in Italy, and was related to the refusal of refugee status to a Ukrainian national for feared persecution on account of her sexual

declared inadmissible. See also Silvia Falcetta, Paul Johnson 'Migration, Sexual Orientation, and the European Convention on Human Rights' [2018] JIAN.

[71] *M.E. v Sweden* App no 71398/12 (ECtHR, 26 June 2014).

[72] ibid, but it is worth noting that this forced concealment was hypothetically meant to be limited in time, ie until a request for family reunion before a Swedish diplomatic representation could be submitted abroad and eventually accepted. See also *M.E. v Sweden* App no 71398/12 (ECtHR, GC, 8 April 2015). The GC decided to strike out this case but interestingly underlined that, in granting the permit, the national authorities had taken into account the applicant's sexual identity.

[73] See *X and Others* (n 16) [53]-[54]: 'the fundamental rights specifically linked to the sexual orientation… *[Articles 7 and 21 of the EU Charter]* [are] not among the fundamental human rights from which no derogation is possible' (emphasis added).

orientation.[74] According to the applicant, she was forced to leave her country because the denigration and hostility against her and her partner by the Ukrainian society, and their surrounding community in particular, reached an unbearable point.[75] Although the applicant and her partner had cohabitated for two years before leaving Ukraine, the applicant publicly hid the real reason for moving into her partner's flat, thus pretending to be her housekeeper. Only on one occasion was this hostility reported to have led to acts of vandalism. Though the applicant's account was deemed credible, in the Tribunal's view she could not be said to have suffered persecution. In fact, although the Tribunal agreed that Ukrainian society has a general negative attitude towards sexual minorities because being homosexual is against 'Ukrainian moral principles' and 'absolutely unacceptable',[76] it cannot be said that Ukraine persecutes LGBT people. Therefore, the lives of the applicant and her partner had never been in danger (ie there was no 'visible' harm related to Articles 2 and 3 ECHR). Besides, cohabitation itself was deemed proof of absence of persecutory acts. Interestingly, since the violations of human rights suffered and feared by the applicant were deemed to be related 'only to' the denial of enjoyment of the 'fundamental' right to respect for family life in Ukraine, the Tribunal rejected refugee status based on lack of persecution.[77]

In sum, to this day, the requirement of sufficiently "serious" or "severe" acts, respectively under the definition of persecution in EU law or the ill-treatment covered by the *non-refoulement* obligation in IHRL, has not been qualified in a way that includes the *endogenous* suffering experienced by people fleeing homophobia. Although recognised in human rights terms, the harm derived from the impossibility to express a fundamental part of their identity without any fear of persecution has not been integrated, at least at

[74] Tribunal of Brescia, 29 May 2018, case 19245/2017.
[75] ibid.
[76] ibid [3.1].
[77] ibid [3.2]. For this reason, the applicant was nonetheless granted, on a discretionary basis, humanitarian protection to enjoy the right protected under Article 8 ECHR.

European and national level, in the implementation of the Refugees Convention. Therefore, while it is true that the CJEU found it irrelevant to distinguish acts that interfere with the core areas of the expression of sexual orientation from acts which do not affect those purported core areas,[78] both the CJEU and national decision-makers seems to require still "exogenous" harm to find persecution in sexual minorities' asylum claims.

This state of affairs may ultimately be connected to a misconception around the exact role of the IHRL in intersection with IRL. In the belief that IRL cannot impose obligations that the IHRL does not demand,[79] decision-makers may find it rational to limit human rights violations leading to persecution under IRL to those rights which call upon States to refrain from expulsion, returns, transfers or even non-admissions in terms argued above. However, under the Refugees Convention, there is no requirement that a persecutory treatment must coincide with a specific right. In practice, even when treatment in the country of destination does not qualify as relevant for applying the prohibition of *refoulement* under IHRL, the same treatment may still be relevant for finding persecution under IRL. Consequently, although IHRL has been taken into consideration in the interpretation of relevant notions under IRL when people fleeing homophobia are involved, this interpretative activity seems to be based on wrong assumptions. The implementation of the Refugees Convention risks being shaped, at least at European and national levels, by those rights which may trigger contracting States' responsibility vis-à-vis people to be returned, rather than by the denial of, and/or restrictions in, the enjoyment of human rights suffered by people fleeing homophobia.

[78] *X and Others* (n 16) [78]. Similarly, Joined cases C-71/11 and C-99/11 *Germany v Y and Z* [2012] ECLI:EU:C:2012:518, para 62.

[79] As the ECtHR itself put it in one of the first applications submitted by a gay asylum claimant: 'on a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention. […] Otherwise, the Convention would impose an excessive burden on them': *F. v UK* App no 17341/03 (ECtHR, 22 June 2004).

Instead, if IHRL has to be properly considered in the interpretation of IRL in light of above VCLT criteria, it is irrelevant whether asylum claimants suffered, or risk, a violation of a right subject to derogation.[80] In fact, since sexual orientation may be expressed – or not – in an endless range of ways and in everyday situations that find protection as such under IHRL, the enjoyment of any protected human right can be potentially relevant in generating a fear of persecution on that ground.[81] Only if this overall enjoyment is taken into consideration in an effective and comprehensive way, does the potential persecution in terms of "endogenous", socially driven, modification imposed in their home countries become clear. Based on the evolving inclusive interpretation of IHRL and the developments emerged after *M.E. v Sweden* and *X and Others* within the ECHR system in *O.M. v Hungary* (section 2), an approach that correctly resorts to IHRL to shape the notion of persecution under IRL without raising unnecessary distinctions between human rights is hereinafter illustrated.

4.2 Interpreting persecution in light of IHRL: possible ways forward

The previous section has shown that, at European level, the suffering experienced by people fleeing homophobia needs to be "visible" and particularly intense for identifying persecution. Although the above experiences of people fleeing homophobia demonstrate that the origin of the harm is not always 'visible' or connected to the violation of a specific human right/freedom, it is no coincidence that a higher burden has been placed on those claimants who had not been physically abused before leaving their home countries.[82] It is equally unsurprising that, during the SOGICA fieldwork, we found decision-makers who believe that the recognition of refugee status depends on the "intensity" of the harm suffered, thus identifying only the most serious and continuous violation of a non-

[80] UNHCR SOGI Guidelines (n 14) [16]-[17].
[81] Or motivate a perpetrator (or the lack of State's protection in case of private agents) to persecute a person on the same ground: ibid [34]-[39].
[82] SOGICA interviews (n 10).

derogable human right as persecution.[83] Yet, a few promising decisions that question this approach can be found at the national level and are worth exploring here.

The first example comes from the Italian Supreme Court.[84] The case was related to a citizen of Senegal, a country that criminalises homosexuality. He claimed he was gay and unable to live freely in his country because of hostility in the familiar and social environment.[85] Following the administrative refusal of his asylum application, both the first and second instance Courts rejected his claim. Specifically, without paying attention to the criminalisation in force in Senegal, the Court of Appeal found that there was no persecution because no 'specific and tangible' acts of violence and threats were alleged. Against this background, the Supreme Court found that 'persecution is to be considered a form of radical fight against a minority',[86] which can also be pursued by criminalising the behaviour that is intended to be fought. By recognising that gay people are forced to violate Senegal's criminal law and to expose themselves to severe penalties 'to live their sexuality freely', the Supreme Court eventually qualified persecution in terms of severe interference with 'private life' and serious repercussions on 'personal freedom'.[87] It is evident from this reasoning that persecution is far from being connected only to non-derogable rights.[88]

Other national Courts seem to follow this approach by embracing a notion of persecution that focuses mostly on its effects on claimants rather than on specific human rights.[89] This is the case of the *Cour National du Droit d'Asile* (CNDA) in France. In a decision related

[83] For instance, interview with first instance judge (Italy, 12 July 2018).
[84] Italian Supreme Court, 20 September 2012, case 15981/2012.
[85] ibid [1].
[86] ibid [5].
[87] ibid.
[88] The Italian Supreme Court reiterates often this principle: see eg Italian Supreme Court, cases 4522/2015, 9946/2017 and 26969/2017.
[89] See also in the Netherlands, Rechtbank Den Haag, 25 May 2018, case NL 17.12618, concerning a claim based on gender identity from Colombia.

to an asylum claimant from Venezuela,[90] which interestingly does not criminalise same-sex sexual activity or homosexuality, the CNDA offered important insights on a possible definition of persecution that comprehensively embeds IHRL rather than looking at its scope of application. Firstly, it recalled that a person is neither asked to publicly manifest his/her sexual orientation in order to request refugee status, nor can he/she be required to avoid expressing this personal characteristic to escape persecution.[91] Secondly, it found that, although the law may formally protect against discrimination based on sexual orientation, same-sex couples' right to marriage/civil union may still not be recognised, and prejudice and exclusion may continue permeating society.[92] Consequently, considering the humiliating effects of these social and institutional attitudes on the specific situation of the applicant, the CNDA found that sexual minorities in Venezuela may in effect be at risk of persecution. Viewed from the perspective of IHRL, it is evident that the CNDA does not set any border between "permissible" and "non-permissible" human rights violations suffered by sexual minorities in their country of origin. It looks instead at the results of the social environment hostility against homosexuality in preventing gay people from enjoying their human rights (including, for instance, the right to employment[93]).

For the sake of completeness, other alternatives have been raised to reach the same fruitful intersection between IHRL and IRL in relation to persecution of people fleeing homophobia. Firstly, a significant attempt to read IRL in light of IHRL can be found at normative level. As the previous paragraph has shown, the 'working definition' of persecution provided by the EU Qualification Directive was thought as a combination of IRL and IHRL obligations binding the EU. As a result, while defining persecution, it stresses the need to consider the effect of human rights violations on each asylum claimant

[90] CNDA, 14 May 2018, case 17052687.
[91] ibid [3].
[92] ibid [4].
[93] ibid [6].

when it refers to persecution also as 'an accumulation of various measures'. Yet, it still provides that this effect should be "serious" enough to be compared to a "severe" violation of basic human rights. As the above analysis of CJEU's case law confirms, the extent to which such an effect is really assessed in relation to the individual experience of people fleeing homophobia remains highly doubtful. Its current implementation instead risks forcing people fleeing homophobia to fabricate a narrative of abuses in order to have their refugee status recognised, with negative consequences in terms of credibility once their real, 'more simple', story of deprivation of life's choices comes to surface. In brief, to reach its potential aim in terms of effective protection in cases involving people fleeing homophobia, this normative attempt needs further clarification at EU level, especially in the framework of the future reform of the CEAS.[94] A second alternative way to interpret persecution in such a way as to embed genuinely the protection afforded to sexual orientation by IHRL is based on a more open reading of non-derogable rights. Taking the ECHR as an example, such an approach requires identifying the consequences of a denial and/or restriction of one's sexual orientation for attempting for enjoyment of the full catalogue of human rights and freedoms in terms of degrading/inhuman treatment or torture (Art. 3 ECHR). However, as the previous analysis has shown, it is difficult even for the ECtHR itself to qualify restrictions reserved to sexual minorities under Article 3, rather than Article 8. This cannot be surprising though. For example, since its outset, the ECtHR has failed to qualify criminalisation of same-sex conduct as a form of prohibited ill-treatment, because in its view this impinges only on the right to respect for private life.[95] A possible explanation for this difficulty relates to the current protection of sexual minorities *within* Europe (ie CoE). Framing treatment suffered by people fleeing homophobia under Article 3 ECHR in light of the modification of the self imposed by

[94] Commission, 'Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe', 6 April 2016.
[95] See *Dudgeon v UK* App no 7525/76 (ECtHR, 22 October 1981), para 63.

society would require the ECtHR to confront the current restrictions to the equal enjoyment of human rights by sexual minorities still in force in many contracting States.[96] For these reasons, only an approach to the Refugees Convention that avoids borders between 'permissible' human rights violations and human rights violations leading to persecution, while stressing the effect of any human rights violation on the individual, can ensure that IHRL is appropriately considered in asylum claims. This will also ensure a more fruitful intersection between IRL and IHRL, being it in line with the VLTC.

5. Crossing borders to identify better solutions

IRL and IHRL are often viewed as complementary international legal regimes. For some, these are 'so intimately interdependent and imbricated that it is now virtually impossible to separate one from the other'.[97] This is especially true in light of the fact that IHRL has progressively become instrumental in reaching a 'dynamic understanding' of refugee law, in particular of the refugee notion, to reflect the evolution of today's international society. Yet, as this contribution has argued by taking the example of people fleeing homophobia, there are still some inconsistencies – or even confusion – in this ongoing relationship. The cross-fertilisation between these two branches of international law is incomplete, as the European and national developments outlined here show. Perhaps more importantly, the role of IHRL should not be limited to the identification of people fleeing homophobia as a group of 'vulnerable' claimants and to the imposition of specific positive obligations, including procedural ones, on relevant States.

Firstly, IHRL may prove effective in raising duties of due diligence by adopting an impact-based model for evaluating the decisions of refusal of entry to receiving States in human rights terms. In fact, in absence of similar obligations under IRL, it may require

[96] See Danisi, *Tutela dei diritti umani* (n 12) 298-300, in relation to the possibility to use Article 3 ECHR (in terms of degrading treatment), alone or in conjunction with non-discrimination (Art. 14 ECHR), against the restriction of public recognition for same-sex couples through marriage.
[97] Chetail, *Are Refugee Rights Human Rights?* (n 46) 68.

relevant States to prevent life-threating experiences and torture or other prohibited ill-treatment for the prevention of violations that SOGI asylum claimants may suffer in attempting to access asylum determination procedures. This reasoning certainly applies where there are "substantial grounds" for believing that this kind of treatment has taken or will take place, as seems to happen in the case of people fleeing homophobia (and beyond – potentially all 'vulnerable' groups under IHRL).

Secondly, IHRL may inform the understanding of the notion of persecution more comprehensively than it currently does in practice. Denials or restrictions in the enjoyment of human rights may indeed provide a parameter against which decision-makers can verify how the perpetrator and the home country's society impose on sexual minorities an inner modification of the self. In doing so, developments in IHRL clarifies that the intersection with IRL cannot lead to creating borders between different human rights violations. Instead, considering the increasingly inclusive reading provided by human rights bodies so far as sexual orientation and its expression is concerned, IHRL can support decision-makers in understanding what life experiences really matter to people fleeing homophobia and, in turn, identifying those that generate a fear of persecution. This is currently far from the case. Despite the recommendations made by the UNHCR, European and national decision-makers still focus their attention on certain rights and freedoms, rather than assessing overall the effect of their denial or restrictions on the individual in creating the conditions for a well-founded fear of persecution.

By looking at the underlying "territorial" and "normative" borders that seem to prevent such developments, this paper has tried to contrast two debatable, but still widespread, assumptions. Firstly, there is an assumption that IHRL cannot fill the gaps of IRL in protecting refugees worldwide and vice versa. Secondly, despite the most recent evolution of the IHRL, a belief in the private nature of sexual orientation is still deeply rooted in decision-makers' thinking. If these territorial and normative borders were to be crossed, not only would people claiming asylum benefit, but there might also be unlooked

for enhancements in the rights of sexual minorities who are residents of receiving countries. In fact, IRL may become instrumental in instilling in decision-makers a common understanding of the harm suffered by sexual minorities when they do not enjoy the wide catalogue of human rights because of their sexual orientation. In doing so, it would consequently contribute to the evolution of IHRL.